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IN THE

Supreme Court of the United States

No. 825

WILLIAM SPROWAL,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

No. .....

WILLIAM SPROWAL,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellant appeals from the order of the Court of Appeals of the State of New York, entered on the 7th of July, 1966, denying appellant's motion for reargument and thereby reaffirming its judgment of the 9th of June, 1966, affirming the conviction of appellant by the Criminal Court of the City of New York, County of New York. The conviction had previously been affirmed by the Supreme Court of the State of New York, Appellate Term, First Department. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The Court of Appeals of the State of New York denied appellant's motion for reargument without opinion, 18 NY 2d 690, 691 (1966), but granted appellant's motion to amend the remittitur (Appendix, p. 1a; 18 NY 2d 683 (1966)).

The Court's previous order affirming the conviction of appellant was without opinion (17 NY 2d 884, 218 N.E. 2nd 343 (1966); Appendix, pp. 3a-5a). Two judges dissented without opinion. The opinion of the Appellate Term of the Supreme Court of the State of New York, First Department is reported at 49 Misc. 2d 806, 268 NYS 2nd 444 (1966) with a dissenting opinion. These are reproduced in the Appendix at pp. 6a-21a. The conviction of appellant in the Criminal Court of the City of New York, County of New York, was without opinion.

Jurisdiction

This is an appeal from a conviction under Section 722-b of the Penal Law of the State of New York commenced by the arrest of appellant on May 29th, 1964. Appellant was convicted after trial in the Criminal Court of the City of New York, County of New York, on September 4, 1964. A Motion to Dismiss because the statute violated the First and Fourteenth Amendments, both on its face and as applied, was denied in the Criminal Court (R. 129, 130).* These arguments were rejected by the Supreme Court of the State of New York, Appellate Term, First Department (order affirming conviction and opinion entered: January 13, 1966, R. 154-170), and by the Court of Appeals of the State of New York (order affirming conviction entered: June 9, 1966; order amending remittitur and denying reargument entered: July 7, 1966). The Notice of Appeal was served and filed on October 3, 1966 in the Criminal Court of the City of New York, County of New York. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. Section 1257(2). The following decisions sustain the

* Numbers in parentheses prefixed by "R." refer to pages of the Record used in the Court of Appeals of the State of New York.

jurisdiction of the Supreme Court to hear this appeal: *La Crosse Tel. Corp.* v. *Wisconsin Board,* 336 U.S. 18, 69 Sup. Ct. 379 (1949); *Cantwell* v. *Connecticut,* 310 U.S. 296, 60 Sup. Ct. 900 (1940); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282, 42 Sup. Ct. 106 (1921); *Cox* v. *State of Louisiana,* 379 U.S. 536, 85 Sup. Ct. 453 (1965).

Questions Presented

1. Whether by interpreting the term "loitering" in a section of a statute entitled "Loitering in School Buildings" in such a way as to apply the statute to one peacefully distributing First Amendment, non-commercial leaflets on a public street in the vicinity of a school, the statute has been rendered unconstitutionally vague in violation of the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

2. Whether the application of a "Loitering" statute to one peacefully distributing leaflets on a public street near a school was an unreasonable limitation on the right to communicate with others in violation of the First Amendment to the Constitution of the United States.

3. Whether the delegation to a public official of discretion as to who may and who may not distribute literature on a public street adjoining a public school, under the facts in this case, renders the statute void on its face in violation of the First Amendment and the "due process" clause of the Fourteenth Amendment to the Constitution of the United States.

Statute Involved

Section 722-b of the Penal Law of the State of New York; Penal Law, Consolidated Laws, c. 40, Section 722-b, provides:

> "Loitering in School Buildings.
>
> "Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct."

Statement

Appellant was convicted and sentenced to 60 days in the workhouse for loitering about a school building in violation of Section 722-b of the Penal Law. The People's only witness, Patrolman Raymond Gruntz, testified that on the afternoon of May 29, 1964, he was on duty at the Charles Evans Hughes High School, located on West 18th Street, between 8th and 9th Avenues in the Borough of Manhattan (R. 9). As the school was about to recess for the day, at approximately 1:10 P.M., a group, including the appellant and his four co-defendants at trial, was observed walking west toward the school (R. 9). In the words of the police officer:

> "As the group got closer, I approached them . . . and I asked—I believe it was the defendant William Sprowal—what was his purpose to be there in front of the School. He said he planned to distribute literature in front of the School, and I asked him, 'What

type of literature?' He showed me it was connected with CORE literature.[1]

"I then instructed him that it would not be permissible to hand out such literature and that if a demonstration was to start in front of the School, it is a violation of Section 722, Subdivision B, of the Penal Law, of Loitering in front of a School" (R. 9, 10).

The patrolman told them they could distribute their literature elsewhere, but not on the street on which the school is located (R. 10-12). As they stood and talked on the street, the group began distributing leaflets to students leaving the school (R. 12, 17). Sprowal continued distributing the literature as the officer repeated his order. The officer entered the school to call for assistance from the local police precinct (R. 13). When the officers arrived, the appellant and his companions were placed under arrest (R. 14, 15). One of the appellant's co-defendants (Steven Gordon) was distributing literature some distance east of the school building when he was ordered to leave the block, and upon not doing so was arrested (R. 16). At the time of the arrest Sprowal was on the public sidewalk in front of the school building. At no time did he attempt to enter the school building or grounds, all the events herein taking place on the public streets (R. 9-30).

At their trial all defendants were acquitted of a second charge[2] (R. 116) and all but the appellant and Gordon

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[1] n.b. Two leaflets were being distributed. One requested students to work with and join CORE; the other requested support for an independent board to review civilian complaints of improper police conduct (R. 139a and 139b).

[2] Section 722(3) of the Penal Law, which reads:

"Disorderly conduct

"Any person who with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned,

were acquitted on the charge of violating Section 722(b) (R. 130). On appeal to the Supreme Court of the State of New York, Appellate Term, First Department, Gordon's conviction was reversed and a new trial ordered on the ground that it was unclear from the record exactly where on the public street Gordon was standing (R. 164). Although the record does not reflect this, the charge against Gordon was subsequently dismissed on motion by the State.

How the federal question is presented.

At the trial in the Criminal Court, counsel for appellant moved to dismiss the charge on the ground that Section 722-b of the Penal Law violated the First Amendment (R. 122, 123) in that as applied the statute unreasonably restrained appellant from exercising the only reasonable method available for communicating with his intended audience (R. 122, 123) and constituted prior censorship (R. 126). Counsel further argued (R. 124, 125) that the statute was "void-for-vagueness", in violation of the due process clause of the Fourteenth Amendment. The Court rejected these arguments by stating that Section 722-b was a reasonable regulation (R. 129).

The intermediate appellate court, the Appellate Term of the Supreme Court of the State of New York, First Department, also rejected arguments based on the vagueness of the statute (R. 159 and Appendix, p. 12a) and the First

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commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: . . .

"3. Congregates with others on a public street and refuses to move on when ordered by the police; . . . "

n.b. This indicates that the Court must have found either that no breach of peace was threatened or intended or that the street was unobstructed, or both.

Amendment (R. 160 and Appendix, pp. 12a, 13a); the dissenting opinion, however, agreed with appellant (R. 166 *et seq.;* Appendix, p. 18a *et seq.*).

In amending the remittitur the N.Y. Court of Appeals also indicated its consideration of these contentions, as had the dissenting Judges Fuld and Bergan previously when they based their dissent on the dissenting opinion of Mr. Justice Hofstadter, below. See 17 NY 2d 884, 218 N.E. 2d 343 (1966).

THE QUESTIONS ARE SUBSTANTIAL

I.

The term "loiter" as used in Section 722-b exemplifies the vagueness of the term as used in such statutes particularly when applied to appellant.

In accomplishing its purpose, Section 722-b of the Penal Law, like similar statutes elsewhere, on its face condemns all persons, other than parents and those with permission, who loiter. Black's Law Dictionary (4th ed., West, 1957) defines "loiter":

> "To be dilatory; to be slow in movement; to stand around or move slowly about, to stand idly around, to spend time idly; to saunter, to delay; to idle; to linger; to lag behind."

Recognizing the word "loiter"

> " . . . does not signify anything bad or criminal except when given that significance in a criminal ordinance or statute" (*State* v. *Starr,* 57 Ariz. 270, 113 P 2d 356, 357 (1941)),

the courts of several states have interpreted the word narrowly in an effort to avoid the problem of vagueness of the statute. *State* v. *Starr, supra; In re Huddleson,* 229 C.A. 2d 618, 40 Cal. Rptr. 581 (1964). In the latter case, the court said:

> " . . . the loitering condemned . . . is not loitering in its general sense, but in its restricted and sinister sense. It includes lingering, waiting and delaying, but only for a sinister or wrongful purpose and therefore excludes such activities for a lawful purpose. . . .
>
> Therefore as we construe the statute before us, persons who merely . . . pause in the vicinity of schools or linger in the many public areas frequented by children cannot be reasonably considered as loitering within the compass of the statute. It is only when the loitering is of such a nature that from the totality of the person's actions and in the light of the prevailing circumstances, it may be reasonably concluded that it is being engaged in 'for the purpose of committing a crime as opportunity may be discovered' (*In re Cregler,* 56 Cal 2d 308, 312, 14 Cal. Rptr. 289, 363 P 2d 305 (1961)) that such conduct falls within the statute."

Other jurisdictions, however, rather than place judicial limitations on the word "loiter", have declared such statutes to be unconstitutionally vague. *Ex parte Mittelstaedt,* 164 Crim. Rep. 115, 297 S.W. 2d 153 (1957); *Soles* v. *City of Vidalia,* 92 Ga.App. 839, 90 SE 2d 249 (1955); *State* v. *Caez,* 81 N.J. Super 315, 195 A 2d 496 (1963).

In *Soles* v. *City of Vidalia, supra,* 90 SE 2d at 252, the Court said:

> "But the ordinance under attack makes no attempt to define or restrict the meaning of 'idling' or 'loitering' to conduct which would constitute a nuisance, a threat to morals, or an interference with the rights of others. . . . the courts of this state do not sanction efforts to put one 'out of circulation' because the police are unable to obtain evidence of unlawful activity with which to support their suspicions that some offense may have been committed."

The New York courts by the position taken in the present case, have chosen neither to limit the scope of the statute nor declare it unconstitutionally vague. Rather they have adopted the view formerly held in California that:

> ". . . the mere fact that some innocent people may desire to loiter near a public school does not deprive the legislature of its power to prohibit loitering at such a place if the safety of school children requires such legislative action." *Phillips* v. *Municipal Court,* 24 Cal App. 2d 453, 455, 75 P 2d 548 (1938). See also *People* v. *Johnson,* 6 NY 2d 549, 161 N.E. 2d 9 (1959).

Even if, *arguendo,* this view has merit under some circumstances and does not render the statute void-for-vagueness, when applied to the facts herein, the term "loiter" is robbed of all reason. The act for which appellant in the present case was arrested was the distribution of literature in the vicinity of a school. When considered in light of that fact, it becomes abundantly clear that Section 722-b of the Penal Law is a statute:

> ". . . so vague and indefinite in form and as interpreted, as to permit within the scope of its language the pun-

ishment of incidents fairly within the guarantee of free speech [which] is void, on its face, as contrary to the Fourteenth Amendment." *Winters* v. *New York,* 333 US 507, 509, 68 S.Ct. 665, 667 (1948).

II.

Section 722(b) unreasonably limited appellant's First Amendment rights.

The peaceful distribution of literature on a public street is clearly within the ambit of First Amendment protection. *Lovell* v. *City of Griffin,* 303 US 444, 58 Sup.Ct. 666 (1937); *Schneider* v. *State of New Jersey,* 308 US 147, 60 Sup.Ct. 146 (1939); *Marsh* v. *State of Alabama,* 326 US 501, 66 Sup.Ct. 276 (1946); *Jamison* v. *State of Texas,* 318 US 413, 63 Sup.Ct. 669 (1943); *Hague* v. *C.I.O.,* 307 US 496, 59 Sup.Ct. 954 (1939). In *Ex parte Jackson,* 96 US 727, at 733, 24 L.Ed. 877 (1877), this Court said:

> "Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value."

The state through its police power may subject the exercise of free speech and press on its streets to reasonable regulation:

> "But one who is rightfully on a street which the state has left open to the public carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word." *Jamison* v. *State of Texas, supra,* 318 US at 416, 63 Sup.Ct. at 672.

Such regulation must be narrowly drawn and even-handedly administered. *Cox* v. *New Hampshire,* 312 US 569, 61 Sup. Ct. 762 (1941). There must be a reasonable relation between the end to be accomplished and the method which the statute adopts. *Stromberg* v. *People of the State of California,* 283 US 359, 369, 51 Sup.Ct. 532, 536 (1931). The obvious and proper interest of the state reflected in Section 722-b, as stated in *People* v. *Johnson, supra,* at 6 NY 2d 552 is to stop:

> "... the presence of unauthorized persons invading the precincts of our schools, such for instance, as dope peddlers, sex offenders, idlers, and trouble makers in general, and other persons harboring some illegitimate purpose involving the innocence of immature school children and youth." *People* v. *Johnson,* 6 NY 2d 549 at 552, 161 NE 2d 9 (1959).

The *Johnson* case involved the application of the statute to a person "hanging around" inside a school building, outside a classroom. To include the acts of appellant within the application of the term "loiter", under Section 722-b of the Penal Law of the State of New York, is neither an appropriate nor a reasonable limitation on his First Amendment rights imposed under a narrowly drawn statute. In effect this constitutes a ban on such speech. *Thornhill* v. *State of Alabama,* 310 US 88, 60 Sup.Ct. 736 (1940). Indeed, the location at which appellant was arrested and the means appellant chose to exercise his rights were the only reasonable ones through which to communicate with his intended audience (R. 122). As this Court stated in *Schneider* v. *State of New Jersey, supra,* 308 US at 163, 60 Sup.Ct. at 151, 152:

> "... the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

III.

A statute empowering a public official to effectively determine who may and who may not distribute literature near a school violates the First Amendment.

The Supreme Court has time and again held restraints on rights that arise out of the First Amendment to be void on their face where broad discretion is given to a state official as to who may or may not exercise these rights. Thus a licensing ordinance which forbade distribution of literature without a license was deemed void on its face in *Lovell* v. *Griffin, supra.* See also *Schneider* v. *State of New Jersey, supra; Hague* v. *C.I.O., supra; Saia* v. *New York,* 324 US 568, 68 Sup.Ct. 1148 (1948).

In January, 1965 the United States Supreme Court reversed a conviction under a Baton Rouge ordinance that was interpreted to prohibit all street assemblies and parades. *Cox* v. *State of Louisiana,* 379 US 536, 85 S.Ct. 453 (1965). There was evidence that local officials permitted certain exceptions and thus the *de facto* discretion lodged in police officials made the conviction an unconstitutional restraint. As the Court stated in *Cox* v. *Louisiana, supra,* 379 US at 557:

> The situation is thus the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion

> of the local officials. The pervasive restraint on freedom of discussion by the practice of the authorities under the statute is not any less effective that (sic) a statute expressly permitting such selective enforcement.
>
> This court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. See *Saia* v. *New York, supra,* at 562. Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws.

In the present case, unbridled administrative discretion was *de jure* as well as *de facto.* Accordingly, Section 722(b) is fatally defective *on its face* in permitting the person in charge of a school to grant written permission waiving the proscription.

As in the cases cited above, the discretion of the supervisory official named in the statute is "unbridled". There are no guidelines to bind the "principal, custodian or other person in charge" in making his determination as to who may loiter and who may not. Not even the words "lawful purpose" or the like, found in most statutes or engrafted thereon by courts limit his scope. See *In re Huddleson, supra; State* v. *Starr, supra;* and statutes analyzed in Lacy, "Vagrancy and Other Crimes of Personal Condition", 66 Harvard L.Rev. 1203 at 1209 (1953).

Furthermore, as noted by Mr. Justice Hofstadter in his dissenting opinion below (Appendix p. 20a, R. 169):

> "... [I]f distribution of literature on the street required the prior permission of the officials named in the statute, this would constitute a form of censorship in conflict with the provisions of both constitutions (citation omitted)."

The conduct of the police officer is an example of the abuse to which the statute lends itself. After the officer asked for, received and examined the handbills he told appellant that he (appellant) could not distribute "such literature". (*Infra* at 5; R. 10). As stated by Mr. Justice Black in his separate opinion in *Cox* v. *State of Louisiana, supra,* 379 US at 579, 85 S.Ct. at 469:

> "Such a statute does not provide for government by clearly defined laws but rather for government by the moment-to-moment opinion of a policeman on his beat."

CONCLUSION

It is submitted that the decision of the Court of Appeals of the State of New York renders Section 722(b) of the New York Penal Law violative of the First and Fourteenth Amendments both on its face and as applied. We believe that the questions presented by this appeal are substantiated and that they are of public importance.

Respectfully submitted,

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APPENDIX

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APPENDIX

Order Appealed From (Denying Reargument and Amending Remittitur)

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Seventh day of July A. D. 1966.

PRESENT,

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 694

THE PEOPLE &c.,

Respondent,

—VS.—

WILLIAM SPROWAL,

Appellant.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause to this Court having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: The defendant contended that section 722-b of the Penal Law of the State of New York, as applied to him, violated his rights under the First and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals held that no rights of defendant under these amendments were violated.

AND the Criminal Court of the City of New York hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

/s/ GEARON KIMBALL
Deputy Clerk

Order of the Court of Appeals Affirming Conviction

No. 185

COURT OF APPEALS

STATE OF NEW YORK, SS.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 9th day of June in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, *Clerk.*

66

App. T. 1. No. 185

THE PEOPLE &c.,
Respondent,

—VS.—

WILLIAM SPROWAL and STEVEN GORDON,
Appellants.

BE IT REMEMBERED, That on the 16th day of April in the year of our Lord one thousand nine hundred and sixty-six, William Sprowal and Steven Gordon, the appellants in this cause, came here unto the Court of Appeals, by Lloyd McAulay, their attorney—and filed in the said Court a Notice

of Appeal and return thereto from the judgment of the Appellate Term of the Supreme Court, First Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Lloyd McAulay of counsel for the appellant—and by Mr. Frederick P. Hafetz, of counsel for the respondent—and after due deliberation had thereon, did order and adjudge that the judgment be and the same hereby is affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Criminal Court of the City of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Criminal Court of the City of New York, before the Judges thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Criminal Court, before the Judges thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,

Albany, June 9, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON

[SEAL]

Order of the Appellate Term

At an Appellate Term of the Supreme Court, First Department, held at the County Court House, Borough of Manhattan, City of New York, on the 13th day of January, 1966.

Present:

HON. GEORGE TILZER, *J.P.*
" WILLIAM C. HECHT, JR.,
" SAMUEL H. HOFSTADTER (dissenting),
Justices.

June #243

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

WILLIAM SPROWAL and STEVEN GORDON,

Defendants-Appellants.

An appeal having been taken to this Court by William Sprowal and Steven Gordon the defendants-appellants from a judgment of conviction by Hon. Reuben Levy a Judge of the New York City Criminal Court, upon the charge of violating §722-b of the Penal Law, entered on the 3rd day of September, 1964, and said defendants-appellants having been sentenced by Hon. Neal P. Bottiglieri & Francis

X. O'Brien, Judges of said Court on the 10th day of November, 1964 and October 19, 1964 as follows:

Sprowal—60 days in the Workhouse

Gordon—$50 or 5 days

and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED that the said judgment so appealed from convicting defendant Gordon of violating §722-b of the Penal Law be and the same is hereby reversed, fine remitted and a new trial ordered. Judgment convicting defendant Sprowal is affirmed.

Fine paid 10/19/64—$50.
Crim. Ct. Part III
Docket #C11353—56
Receipt # .....

ENTER

(Signature illegible)
Justice, Appellate Term
Supreme Court, First Department

Opinions of the Appellate Term

SUPREME COURT

APPELLATE TERM, FIRST DEPARTMENT

June, 1965

Present:

HON. GEORGE TILZER,

J.P.

" WILLIAM C. HECHT, JR.,

" SAMUEL H. HOFSTADTER,

Justices.

No. 243

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

WILLIAM SPROWAL and STEVEN GORDON,

Defendants-Appellants.

Appeal by defendants from a judgment of conviction of the Criminal Court of the City of New York, County of New York, convicting them, after trial, of violating section 722-b of the Penal Law.

FRANK S. HOGAN, District Attorney, New York County [Frederick P. Hafetz, Assistant District Attorney, of Counsel], *for Respondent.*

LLOYD MCAULAY, *Attorney for Defendants-Appellants.*

TILZER, *J.*:

The defendants appeal from a judgment of the Criminal Court of the City of New York, County of New York, convicting them, after trial, of violating section 722-b of the Penal Law. Defendant Gordon was sentenced to serve five days imprisonment or to pay $50.00 and defendant Sprowal was sentenced to serve 60 days in the Workhouse.

Penal Law, section 722-b, entitled "loitering in school buildings," provides:

> "Any person not the parent or legal guardian of a pupil in regular attendance at said school who loiters in or about any school building or grounds without written permission from the principal, custodian or other person in charge thereof, or in violation of posted rules or regulations governing the use thereof, shall be guilty of disorderly conduct."

Patrolman Gruntz testified that at 1:40 in the afternoon of May 29, 1964, while standing in front of the main entrance of the Charles Evans Hughes High School, he observed a group of some eight persons walking toward the school. The school located on the north side of West 18th Street, in the middle of the block between Eighth and Ninth Avenues, Manhattan. There is no yard or fence between the school and the sidewalk, and the sidewalk is ten to twelve feet wide. Officer Gruntz inquired of defendant-appellant Sprowal what the group intended to do and Sprowal replied that they planned to distribute literature in front of the school. The officer then told Sprowal that it was not permissible to hand out such literature in front of the school; that they could distribute the leaflets on the corner or on another block, but that they could not interfere

with the students coming in or out of the school. At the time between 250 and 500 students were leaving the school. At the front entrance to the school building was a sign reading, "No loitering. Persons found loitering in front of the building are subject to the charge of Disorderly Conduct."

For some 30 minutes the officer pleaded with the defendants to discontinue handing out the literature in front of the entrance to the school, not to block up the place and get out of the block as they were interfering with the dismissal of the students. Sprowal refused to move and sat down on the street. Four others, of the original group of eight, also refused to move away from the school and continued handing out literature, within five feet from the main entrance of the school, to some 200 students who were milling around the group.* Gruntz then placed Sprowal and three of the others under arrest. The defendant-appellant Gordon in the meantime had moved 200-300 feet east of the school, where he continued handing out literature. Gruntz had a fellow officer summon Gordon to his side, and Gordon having refused to leave the block, was also placed under arrest. At this point, due to the pressure of the students emerging from the school, the officer and the defendants crossed to the south side of the street.

The trial court, in an oral opinion, found three of the defendants, who according to defense testimony never distributed literature on the school side of the street, not guilty of violating section 722-b. Defendants Sprowal and

* The leaflets being distributed requested students to work with and join CORE and also requested support for a bill to establish an independent civilian board to review charges of improper police activities.

Gordon were found guilty of violating section 722-b. The court did not indicate whether it had accepted the People's or the defense's testimony concerning the position of defendant Gordon on West 18th Street.

It is against this background that we consider the various arguments of the appellants. A legitimate interpretation of section 722-b, in our view, is that the activities of the appellants (passing for the moment the question of whether the acts or conduct of each of the appellants were identical in kind) were not irrelevant to the purpose for which the statute was passed. While the Legislature was concerned primarily with preventing vandalism and assaults on pupils and teachers, it was also advised of the serious difficulties that school authorities both within and without the City were having with gangs of young people coming into schools, frightening teachers and pupils, creating disturbances and "making nuisances of themselves in or about a public school" (Letter of Executive Secretary of New York State School Boards Associations, Inc., to Governor Dewey, March 31, 1954, in relation to bill that ultimately became section 722-b). The method chosen by the Legislature to protect the schools was a blanket prohibition against the presence of all unauthorized persons from the vicinity of school grounds. If leaflet distributors are excluded from the operation of section 722-b, then the ability of school authorities and police to protect pupils against the distribution of obscenity and narcotics in or about school premises will be impaired. The authorities will be forced to scrutinize every person near a school with leaflets in order to distinguish between those with leaflets only, and others who may have obscene matter and narcotics in addition to leaflets.

Nor do we find that the statute itself is void for vagueness and indefiniteness. The Court of Appeals held the section constitutional against attack on the same ground in People v. Johnson (6 N Y 2d 549). There Johnson actually invaded the school building and grounds of a country school. The fact that the activities of appellants took place on the street in front of the entrance of a New York City public school does not thereby legitimatize their conduct. We must give to the statute a sensible construction with relation to the evils sought to be proscribed. The protection to be afforded pupils may not depend upon the circumstance that the school in one case embraces an area of many acres in a rural community while in another the school is devoid of grounds and fronts directly on a public street in a large city. The "section was designed to exclude from school areas degenerates, narcotic peddlers, vandals and the like" (dissenting opinion of Fuld, J., People v. Johnson, supra, at page 554). At least as applied to appellants' conduct some five feet from the main entrance to the school, the statute, in using the term "in or about" a school building, is not lacking in specificity (Cox v. Louisiana, 379 U.S. 536 [1965]).

Moreover, section 722-b does not impose a prior restraint on free speech. The restraint imposed by the statute is not one affecting speech. It places an absolute ban on the physical presence of unauthorized persons in the limited areas in or about school buildings. For that matter, the appellants failed to offer any proof of arbitrary or discriminatory application of the requirement of prior approval by the school authorities.

We too are concerned in protecting our citizens in their ancient right to use of the streets for the dissemination

of information and opinion. This right, nevertheless, ranks no higher than other rights protected by the constitutions and is subject to reasonable restrictions when necessary to safeguard the public interest. The right is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order (Hague v. C.I.O., 307 U.S. 515; People v. Stover, 12 N Y 2d 462, 469). It is our "delicate and difficult task" to weigh "the circumstances" and appraise "the substantiality of the reasons advanced in support of the regulation of the free enjoyment of" speech. (Schneider v. State, 308 U.S. 147, 161.)

It must be observed that the statute in the case at bar is not directed at freedom of speech. The fact that it may have a partial and incidental deterrent effect on free speech is justifiable and a necessary concession to the overriding public interest in the maintenance of order and the protection of pupils caused "by the presence of unauthorized persons invading the precincts of our schools such, for instance, as dope peddlers, sex offenders, idlers and trouble makers in general, and other persons harboring some illegitimate purpose involving the innocence of immature school children and youth." (People v. Johnson, supra, at page 552.) Moreover, appellants may not exercise this liberty by taking a stand directly in front of the main entrance of a school, forming a cordon which blocked the erupting mass of students. Prohibition of such conduct would not abridge the constitutional liberty. In order to assure the safety and convenience of its citizens a state may regulate the times and places and the conduct of those using the streets to impart information through speech or distribution of literature. (Cantwell v. State of Connecticut,

310 U.S. 296, 304.) When those sought to be safeguarded are the youth of the community, any conflict arising between the remedy provided by the Legislature and First Amendment freedoms must be resolved in favor of the statute designed to insulate students from the dangers and evils enumerated. Because of their very youth and inexperience, their susceptibility and exposure to the vices of a large city, the measure of control which the state may exercise for the protection of school students is of much wider scope than that which might be exercised for the community at large. (Prince v. Massachusetts, 321 U.S. 158.)

It must be noted too that the statute impinges on the right to use the street for the dissemination of information in but a minor way. The proscription applies only to streets contiguous to school buildings. And even this forbidden area would be limited to the street in the immediate school area. The appellants before us, as well as their six companions could have achieved their goal of distributing literature to the students without violating the statute by moving to the corners of Eighth and Ninth Avenues, as suggested by the officer.

The interest of the State that its youth shall come to manhood in physical and moral health justifies the statute in issue. Such conclusion is not weakened by any fear that the statute will be utilized to impose a special restraint upon academic freedom. We would not shield our youth from the expression of ideas, even those repugnant to our own. But we would insist that this constitutional right, as all such rights, be exercised in consonance with peace and good order. If not, and if our young citizens be shown an example of disregard of law and apathy on the part of governmental authority, we will have failed in their educa-

tion as to the true meaning of liberty and freedom. The exercise of a constitutional right cannot license an illegal act. "* * * The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. * * *" (Cox v. Louisiana, supra, at page 554.)

We have indicated earlier that it was impossible to ascertain from the oral opinion rendered by the trial court whether the determination of the defendant Gordon's guilt was based upon a finding of fact that he stood 300 feet down the city block from the end of the school building and in front of an apartment house thirty feet from a corner, as the defense testified, or that he stood with the defendant Sprowal five feet from the main entrance to the high school, as the complaining officer testified. The defense testimony was at least partially accepted and the officer's rejected by the court by its judgment acquitting three defendants. If the defense testimony was accepted as to the defendant Gordon, since the statute, as we have also noted above, applies only to streets contiguous to school buildings and grounds in the immediate school area, the trial court erred in finding that Gordon violated section 722-b. As a matter of law, under the circumstances of this case, Gordon could not be said to have been loitering in or about a school building or grounds if he was distributing leaflets some 300 feet down the city block from the end of the school building. Accordingly, the judgment convicting the defendant Gordon of violating section 722-b of the Penal Law is reversed, the fine remitted and a new trial ordered.

With regard to the defendant Sprowal, it is urged that there was no possible justification for imposing a sentence of 60 days imprisonment on this appellant. Since an issue is raised in this regard and since Sprowal's criminal record is properly to be considered on the question of sentence (Ethical Problems in the Performance of the Judicial Function, Hon. Charles D. Breitel, Associate Justice, Appellate Division, First Department, New York Law Journal, October 13, 1965, page 4), it is to be observed that Sprowal's criminal record in this State dates back to 1959. In 1959, 1960 and 1961 he was arrested and subsequently convicted for violations of the public health law with respect to narcotic drugs. In July of 1963, the sentencing court noted, Sprowal received two 30-day suspended sentences for obstructing a police officer and for disorderly conduct. The record in the circumstances does not disclose adequate reason to commend appellant to clement regard by an appellate court. The judgment convicting defendant Sprowal is affirmed.

/s/ G. T.

SUPREME COURT

APPELLATE TERM—FIRST DEPARTMENT

June, 1965

Present:—HON. GEORGE TILZER, *J. P.*
" WILLIAM C. HECHT, JR.
" SAMUEL H. HOFSTADTER,
Justices.

No. 243

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

WILLIAM SPROWAL and STEVEN GORDON,

Defendants-Appellants.

Appeal by defendants from a judgment of conviction of the Criminal Court of the City of New York, County of New York, convicting them, after trial, of violating section 722-b of the Penal Law.

Frank S. Hogan, District Attorney, New York County,
(Frederick P. Hafetz, Assistant District Attorney, of counsel)
Attorney for Respondent.

Lloyd McAulay, Esq., New York City
Attorney for Defendants-Appellants.

HOFSTADTER, *J.*: (Dissent)

Defendant Sprowal was distributing CORE leaflets on the sidewalk in front of a school. Defendant Gordon was apparently doing the same some 200 to 300 feet from the school. Charged with congregating with others on a public street and refusing to move on when ordered by the police (Penal Law, § 722 [3]) and with loitering in or about a school building (Penal Law, § 722-b), they were acquitted of the first charge and found guilty of the second. Three others of the group, arrested at the same time, were acquitted of both charges. In my judgment, section 722-b is not applicable to the fact pattern before us; if deemed applicable, it is, to that extent, unconstitutional. I would reverse the convictions and dismiss the complaint.

I cannot agree that a citizen's right to use the streets for the dissemination of information ranks no higher than other rights protected by the constitutions. The First Amendment is the "matrix, the indispensable condition of nearly every other form of freedom" (Palko v. Connecticut, 302 U. S. 319, 327). Its guarantees of freedom of speech, of press, of the people to assemble peacefully and to petition for the redress of grievances, were the first of the Bill of Rights to be secured from State abridgment by the "due process" clause of the Fourteenth Amendment (DeJonge v. Oregon, 299 U. S. 353; Grosjean v. American Press Co., 297 U. S. 233; Gitlow v. New York, 268 U. S. 652; Hague v. C.I.O., 307 U. S. 496, 515; see, also, Steelworkers v. Labor Board, 376 U. S. 492 and Sullivan v. Times, 375 U. S. 803). "All have preferred position in our basic scheme" (Prince v. Commonwealth of Massachusetts, 321 U. S. 158, 164). The counterpart of the great canon is to be found in our State Constitution—Art. I, §§ 8, 9.

Nor may I equate the enforcement of child labor laws, as in Prince v. Commonwealth of Massachusetts, supra, with the distribution of literature on the sidewalk (see: Shuttlesworth v. City of Birmingham, 34 L. W. 4009, 4010). Defendants were not loitering in a school building, as was the case in People v. Johnson, 6 N Y 2d 549; the element of trespass is wholly lacking. They were exercising fundamental rights on a public street (Hague v. C.I.O., supra, 307 U. S. 496, 515; Lovell v. Griffin, 303 U. S. 444; see, also, Martin v. Struthers, 319 U. S. 141; Jamison v. Texas, 318 U. S. 413). Their design was proper—not illegal or illicit (Giboney v. Empire Storage Co., 336 U. S. 490).

It is one thing to enter a school building or its grounds without permission or legitimate purpose. It is quite another to distribute a petition on the street. To authorize limitation upon free communication between citizens on a public highway, the facts must disclose an evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that specific conduct be limited or forbidden (Cox v. Louisiana, 379 U. S. 559; Edwards v. South Carolina, 372 U. S. 229, 236-237).

Penal Law, section 722-b, is not such a statute. Nor, in my opinion, was it intended to cover the dissemination of handbills in the vicinity of a school (see: People v. Dennis, 208 N. Y. S. 2d 522). If construed to encompass such activity, the section would come into fatal collision with the constitutional prohibitions already mentioned (see also: Cantwell v. Connecticut, 310 U. S. 296, 304, 307; Schneider v. New Jersey, 308 U. S. 147, 161). For, as noted, regulation of conduct may not be so broadly framed as to stifle freedom of speech (Shuttlesworth v. City of Birmingham,

supra; Cox v. Louisiana, supra; Edwards v. South Carolina, supra).

Moreover, if distribution of literature on the street required the prior permission of the officials named in the statute, this would constitute a form of censorship in conflict with the provisions of both constitutions (Lovell v. Griffin, supra). The construction of a statute is inadmissible which involves an inhibited application. An otherwise constitutional enactment may not be unconstitutionally enforced.

The posted "No Loitering" sign at the entrance to the school does not help the prosecution. Is distributing informational matter loitering? I think not—nor is the word "loitering" by itself, and without more, "enough to inform a citizen of its criminal implications" (People v. Diaz, 4 N Y 2d 469, 470). If the posted sign is relied on to bolster the statute, the statute is open to arbitrary enforcement and fatally defective as vague. "It is the rule that for validity a criminal statute must be informative on its face (People v. Firth, 3 N Y 2d 472) and so explicit that 'all men subject to their penalties may know what acts it is their duty to avoid' (United States v. Brewer, 139 U. S. 278, 288; People v. Vetri, 309 N. Y. 401)" (ibid.). Neither the statute nor sign conforms to this rule.

There is no showing in the case before us that the conduct of either defendant was calculated to distract the students in their classrooms, or threatened to harm them, or was calculated to damage the school facilities in any way. Absent trespass or disorderly conduct in its normal reading, the finding of guilt by the court below under section 722-b was without legal justification. The intent of the section

is to proscribe the presence of intruders and persons without an acceptable purpose in or about a school. It is not intended to stop, on a public street, innocent conduct constitutionally protected.

I, therefore, dissent and vote to dismiss the complaint against both defendants.

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/s/ S. H. H.